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September 18, 2020

VIA ELECTRONIC FILING

The Honorable Jocelyn G. Boyd
Chief Clerk/ Executive Director
Public Service Commission of South Carolina
101 Executive Center Drive, Suite 100
Columbia, SC 29210

**Re: Rulemaking Proceeding for the Purpose of Promulgating a Regulation to Help Prevent the Potential for Misleading Advertisements by Prohibiting the Sale of Customer Data by Regulated Utilities Absent a Customer's Direct Consent (See Commission Order No. 2019-877)
Docket Number: 2019-387-A**

Dear Ms. Boyd:

On August 3, 2020, Duke Energy Carolinas, LLC ("DEC") and Duke Energy Progress, LLC ("DEP") (collectively, the "Companies") filed joint comments in the above-referenced docket concerning proposed regulation 103-823.2, Protection of Customer Data (the "Proposed Regulation"). Pursuant to S.C. Code Ann. § 1-23-110, the Proposed Regulation was published in the State Register on June 26, 2020. Commission staff circulated draft revisions to the Proposed Regulation on September 15, 2020 for discussion purposes, and the Public Service Commission of South Carolina (the "Commission") convened a public hearing in this matter on September 16, 2020. At the hearing, the Chairman directed that the record be held open for additional written submissions until September 18, 2020. The Companies respectfully submit these comments in response to the recommendations offered by the South Carolina Department of Consumer Affairs ("SCDCA") and the issues raised at the public hearing.

In its comments, SCDCA recommends: 1) revising the definition of "personal identifying information," 2) revising the definition of "customer data" to include former customers of a utility, 3) adding a due diligence requirement for the selection of the third party with whom customer data will be shared, and 4) requiring utilities to provide both an initial and an annual notice to customers regarding the utility's privacy policies.

1. Section A: Definition of Personal Identifying Information

SCDCA notes that the term “personal identifying information” is a phrase that is defined in S.C. Code Ann. §§ 39-1-90(D)(3) and 16-13-510(D). As SCDCA notes in comments, these two statutes define personal identifying information in different ways.¹ SCDCA recommends that the Commission reference these statutes in the Proposed Regulation to alleviate confusion or, in the alternative, change the phrase that is used.

The Companies agree that the term “personal identifying information,” if it is to remain part of the definition of “customer data,” should be separately defined within the Proposed Regulation and should include within its definition specific data elements or provide reference to a statute. However, the Companies disagree with SCDCA that the statute should reference S.C. Code Ann. §§ 39-1-90 or 16-13-510(d), because those definitions of “personal identifying information” include data elements not regulated by the Commission.² Further, these statutes are inconsistent with each other in their definition of “personal identifying information,” so a simultaneous reference to both Code sections would lead to an inconsistency in the regulation and confusion.

To simplify the definition and avoid confusion with conflicting definitions of “personal identifying information,” the Companies recommend defining “customer data” as follows:

(3) Customer Data. For purposes of this section, “customer data” means data about a current or former customer’s electric, natural gas, water, or wastewater usage; information that is obtained as part of an advanced metering infrastructure; non public retail customer specific data or information that has been obtained or compiled by a public utility in connection with the supplying of Commission regulated electric, natural gas, waste, or wastewater services, including data in

¹ S.C. Code Ann. § 39-1-90(D)(3) defines “personal identifying information” as first name or first initial and last name in combination with one or more of the following: social security number; driver’s license number or state identification card number used instead of a driver’s license; financial account number, or credit or debit card number in combination with any required security code, access code or password that would permit access to a financial account; or other numbers or information which may be used to access a person’s financial accounts or numbers or information issued by a governmental or regulatory entity that uniquely will identify an individual. S.C. Code Ann. § 16-13-510(D) provides that “personal identifying information” includes, but is not limited to, the following: social security numbers; driver’s license numbers or state identification card numbers; checking account numbers; savings account numbers; credit card numbers; debit card numbers; PIN numbers; electronic identification numbers; digital signatures; dates of birth; current or former names, but only when used in combination with and linked to other identifying information provided in this section; current or former addresses, but only when used in combination with and linked to other identifying information provided by this section; or other numbers, passwords, or information which may be used to access a person’s financial resources, numbers, or information issued by a governmental or regulatory entity that will uniquely identify an individual or an individual’s financial resources.

² The Companies would also point out that, in the draft revised Proposed Regulation circulated on September 15, 2020, “personal identifying information” is defined both at subsections (A)(3) and (A)(4); these conflicting definitions would need to be reconciled for purposes of the next iteration of the Proposed Regulation.

systems collected for billing purposes, ~~such as a customer's name, account number, billing history, address, email address, telephone number, and fax number~~; about the customer's participation in regulated public utility programs, such as renewable energy, demand side management, load management, or energy efficiency programs; or any other non public information specific to a customer that is related to electricity consumption, load profile, or billing history.

This definition incorporates the elements of the term "personal identifying information" as set forth in the Commission's Proposed Regulation while eliminating any potential confusion by deleting the term from the definition of "customer data." If the Commission chooses to eliminate the term from the definition of "customer data," section (C)(2) should be amended to read as follows: "A public utility shall not sell a customer's data ~~or any other personal identifiable information~~ for any purpose without the consent of the customer."

Alternatively, the Companies recommend that the Commission use the separate definition of "personal identifying information" in Section A of the Proposed Regulation as set forth in the Companies' comments filed on August 3, 2020.

2. Section A: Definition of Customer Data

SCDCA also recommends that Section A of the Proposed Regulation include a separate definition of the term "customer." SCDCA states that because the term "customer" is not defined, the phrase "customer data" could be construed so that "customer" is only referring to a person who is currently receiving service from a utility and therefore the protections of this Proposed Regulation would not apply to former customers of a utility.

The Companies protect the data of former customers in the same manner as the data of current customers, in accordance with the Code of Conduct and are agreeable to revising the definition of "customer data" to specifically reference current and former customers.

3. Sections C-F: Sharing Customer Data With Third Parties

SCDCA also recommends imposing a due diligence requirement on utilities "when choosing third parties with whom it will share data." SCDCA Comments at 4. SCDCA suggests that parameters should include the following:

1. Conducting thorough due diligence to verify that the third party understands and is capable of complying with privacy laws prior to contracting with the party and establishing ongoing monitoring to determine compliance during the contract term;
2. Requesting and reviewing the third party's policies, procedures, internal controls, and training materials to ensure that the third party conducts appropriate training and oversight of employees;

3. Including in the contract with the third party clear expectations about compliance, as well as appropriate and enforceable consequences for violating any compliance-related responsibilities, including failing to properly protect customer data; and
4. Taking prompt action to address any problems identified through the monitoring process or that is otherwise brought to the utility's attention, including termination of the relationship when appropriate.

As discussed at the hearing, these requirements would be unnecessarily burdensome and costly, particularly in cases where (1) a customer consents; (2) limited information is shared; or (3) information is shared for a targeted purpose. Additionally, these requirements are founded upon the incorrect assumption that utilities have a contract with all third parties with whom customer data is shared. In fact, the Companies sometimes share information with third parties in the absence of a contractual relationship, including, for example, when a customer requests their specific usage data to be sent to a third party for energy analysis or when an assistance agency wishes to pay a customer's bill. The Companies also share the concerns raised by Dominion Energy South Carolina, Inc. ("Dominion") at the public hearing regarding application of the proposed due diligence provisions in the storm restoration context and in dealing with law enforcement and municipalities. The Companies agree with Dominion's assessment that, while these provisions may make sense in a financial or commercial setting, they are not workable in the utility context.

In general, as outlined in the Code of Conduct, DEC and DEP do not disclose customer information to non-affiliated third parties, affiliates, or nonpublic utility operations without customer authorization to do so. In situations where DEC and DEP enter into contracts with vendors providing a service to or on behalf of the utility, those contracts have explicit provisions against utilizing any customer information for any purpose other than the service(s) being provided to the utility.

When the Companies provide customer data to third parties who are not approved vendors, there are steps that the Companies take regarding such data. If the data is being disclosed to a third party who was identified by the customer, the customer must complete and execute a Customer Data Request Consent Form. If the customer wants to share data with a Duke affiliate or nonpublic utility operations, the customer must execute a Customer Disclosure Authorization and Disclaimer.

The Companies run extensive checks on any vendors that are hired under contract; however, doing such an extensive check on every third party with a Power of Attorney, consent form, or court order would be burdensome and expensive, and such costs would be passed along to customers.³ Additionally, the Companies respond to and investigate all reports from vendors who experience a breach related to personal identifying information and/or customer information.

³ The Companies perform Third Party Risk Management ("TPRM") reviews in the following situations: 1) when a third-party stores or transmits Company Information using infrastructure not owned or operated by the Companies; 2) when a third-party hosts an application used for company business purposes, using infrastructure not owned or operated by the Companies; and 3) when related third-party network connections are established, including VPN and dedicated circuit connections.

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Implementing a due diligence requirement such as the one suggested by SCDCA would place a heavy burden on the utilities that would require them to police third parties who obtain customer data. Third parties who are given consent by the customer to receive that customer's data should and are required to uphold their privacy obligations to that customer. Additionally, requiring the utility to police third parties with authorized access to customer data would be burdensome on the utility's customers. Such a policy would require extensive costs, which would be passed on to the rate payers, to build a third-party review process. It would also make the process of providing authorized customer data to third parties more cumbersome for both the utilities and customers.

The Companies agree with the observation made during the public hearing that the subsection of the draft regulation regarding due diligence—added at subsection (J)—would be better addressed in each utility's respective proceeding regarding the utility's guidelines. While the draft regulation appropriately implements various safeguards against the unauthorized disclosure of customer information, each utility subject to the Commission's jurisdiction is uniquely situated when it comes to what types of information they collect, retain, and may share with third parties. Further, applying due diligence and ongoing compliance monitoring requirements would make little sense in a situation where, for example, the utility shares very limited customer information, with the customer's consent, with a third party for a narrow purpose (e.g., in a one-time customer assistance arrangement). For these reasons, these issues would be better addressed as each utility develops and seeks Commission approval of their respective guidelines.

4. Section H(2)(A): Notices

SCDCA's final recommendation is for the Commission to add an initial and annual notice requirement to customers regarding the utility's privacy policies. As an initial matter, the Companies believe any discussion of notice requirements would be more appropriately addressed in each utility's respective guidelines, as subsection (H)(2)(a) of the Proposed Regulation provides that each utility's guidelines should, at a minimum, address "Customer Notice and Awareness – practices to explain policies and procedures to customers."

The Companies currently provide notice of their privacy policies and practices on their website in lieu of sending written notices to customers. In order to comply with the SCDCA's recommendation, the Companies would likely have to include their privacy policy with each new customer mailer, increasing both the time and cost of compliance. The Companies believe the potential costs of producing and mailing initial and annual notices would be substantial, while the benefit to customers would be minimal.

5. Penalties

The Companies question the authority of the Commission to add a penalty provision to a regulation without express statutory authority. As a creature of statute, the Commission possesses "only those powers expressly conferred or necessarily implied for it to effectively fulfill the duties with which it is charged." *Captain's Quarters Motor Inn, Inc. v. S.C. Coastal Council*, 306 S.C.

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488, 490, 413 S.E.2d 13, 14 (1991). Its authority is therefore “dependent upon statute, so that they must find within the statute warrant for the exercise of any authority which they claim. . . . Any reasonable doubt of the existence in the commission of any particular power should ordinarily be resolved against its exercise of the power.” *Calhoun Life Ins. Co. v. Gambrell*, 245 S.C. 406, 411-12, 140 S.E.2d 774, 776 (1965) (internal citations omitted).

Article 19 of Chapter 27, Title 58 provides for the assessment of penalties against electric utilities under certain circumstances and provides that actions to recover such penalties must be brought in a court of competent jurisdiction (i.e., not assessed by the Commission). Moreover, these provisions apply only as against electric utilities and would not apply to other regulated utilities. The Companies are aware of no generally applicable provision that would grant the Commission with the necessary authority to assess penalties for violating its regulations, and the provisions of Article 19 would seem to supersede and displace the Commission’s authority to include a penalty provision in a newly promulgated regulation.

As discussed at the hearing on September 16, the North Carolina Utilities Commission (the “NCUC”) is currently addressing the issue of customer data in a rulemaking in Docket No. E-100, Sub 161, and the Public Staff has proposed changes to NCUC Rule R8-51.⁴ Because DEC and DEP operate on a combined basis in North Carolina and South Carolina, having conflicting rules concerning customer data could create operational complexities that may be difficult or impossible for the Companies to accommodate. In response to Commissioner Ervin’s inquiry at the public hearing in this matter, the Companies can report that the Public Staff’s proposed R8-51 does not include a penalty provision.

Finally, to the extent the Commission decides to add additional provisions to the Proposed Regulation from which was previously noticed in the State Register—including a new penalty provision—the Companies respectfully offer that such an addition could represent a “substantive change in the content of [the] regulation” as discussed in S.C. Code Ann. § 1-23-110(C)(2), and therefore the amended regulation would need to be refiled with the State Register and parties given a subsequent opportunity to file comments and discuss the amended regulation at a public hearing.

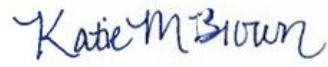
Conclusion

The Companies appreciate the opportunity to provide additional comments on the Commission’s Proposed Regulation. The Companies believe that these revisions and recommendations will result in a rule that both provides strong protections for customer data and does not impose additional, unnecessary costs on ratepayers. Accordingly, the Companies respectfully request that the Commission incorporate the recommendations and limited amendments discussed above into the final regulation.

⁴ A copy of the Public Staff’s proposed changes to R8-51, which was filed with the NCUC on February 10, 2020, is attached hereto. The Companies generally support the Public Staff’s proposed Rule R8-51, with limited exceptions discussed in their initial comments filed with the NCUC on February 10, 2020 and their reply comments filed with the NCUC on July 17, 2020.

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Sincerely,



Katie M. Brown

Enclosure

cc: Parties of record (via email)

Customer Data Access.

Rule R8-51. ~~PROVISION OF PAST BILLING HISTORY UPON CONSUMER REQUEST.~~

~~Each utility, upon the request of one of its consumers, shall provide the past billing information of such consumer as provided in this rule. The minimum information which shall be provided shall include the following in an easily understood format: the name of the rate schedule under which such consumer is served; a clear specification of the months and years of data supplied (twelve month minimum); and a clear itemization of the demand billing units, basic facilities charge, kilowatt-hour usage, and dollar amount of bills for each bill rendered during the period to which the data relates. The utility may charge up to \$5.00 for all subsequent requests for a past billing history made by the same consumer for the same service location within a twelve (12) month period.~~

PROVISION OF CUSTOMER DATA.

a) Definitions.

- 1) "Aggregated data" means customer data, alone or in combination with non-customer data, resulting from processing (e.g., average of a group of customers) or the compilation of customer data from which all unique identifiers have been removed.
- 2) "Customer data" means non-public retail customer-specific data or information, excluding personal information, that has been obtained or compiled by an electric public utility in connection with the supplying of Commission-regulated electric power generation, transmission, distribution, delivery, and sales, and other related services, such as administration of customer accounts and rate schedules, metering, billing, standby service, backups, and changeover of service to other suppliers. Customer data includes data or information that is:
 - i. Collected from the electric meter, by the utility, and stored in its data systems for billing purposes (e.g., kWh, kW, voltage, VARs, power factor);
 - ii. Customer-specific energy usage information for regulated utility service;
 - iii. About the customer's participation in regulated utility programs, such as renewable energy, demand-side management, load management, or energy efficiency programs; or
 - iv. Any other non-public information specific to a customer that is related to electricity consumption, load profile or billing history.
- 3) "Non-public utility operations" means all business enterprises engaged in by a utility that are not regulated by the Commission or otherwise subject to public utility regulation at the state or federal level.

- 4) "Personal information" means the same as "Identifying information" as defined in G.S. 14-113.20.
- 5) "Third party" means a person who is not the customer, nor any of the following: (i) an agent of the customer designated by the customer with the utility to act on the customer's behalf, (ii) a regulated utility serving the customer, or (iii) a contracted agent of the utility. For the purposes of this rule, "third party" includes any nonpublic utility operation or affiliate of the utility.
- 6) "Unique identifier" means a customer's name, account number, meter number, mailing address, telephone number, or email address.
- b) A utility shall protect customer data, in its possession or control, to maintain the privacy of its public utility customers, while providing those customers reasonable access to their own customer data. A utility is only authorized to use customer data to provide regulated utility service as provided for in G.S. 62-3(23). Nothing in these rules limits a customer's ability to provide its own customer data to any other party. A utility must inform the Commission of any disclosure of a customer's data without the customer's consent.
- c) Except as provided herein, a utility may not disclose customer data to any third party without the customer's consent unless otherwise required by law. A customer may provide consent for disclosure of its customer data to a third party as provided in this rule. A utility may, however, in its provision of regulated utility service, disclose customer data to a third party, consistent with the utility's most recently approved Commission Code of Conduct, to the extent necessary for the third party to provide goods or services to the utility and upon written agreement by that third party to protect the confidentiality of such customer data.
- d) A utility shall maintain at least 24 months of customer data in sufficient detail to assist customers in understanding their energy usage. The frequency interval of data must be commensurate with the meter or network technology used to serve the customer. Customer data shall be maintained in electronic machine-readable format that conforms to nationally-recognized standards and best practices commensurate with the meter or network technology used to serve the customer.
- e) The utility shall not charge any customer for access to its customer data from the prior 24 months. Utilities may charge customers a Commission-approved fee for data outside of the latest 24 month period. Other authorized third parties may be charged Commission-approved fees for customer data. All parties, including customers, may be charged Commission-approved fee for aggregated data. The fees charged for customer data must be commensurate with the costs the utility incurs in assembling, compiling, preparing, furnishing the requested customer data.

- f) The utility shall conspicuously post on its website, or provide in writing upon request by any party, a description of customer data that the utility is able to provide within the utility's technological and data capabilities to the customer, an authorized representative of the customer, or authorized third party recipient along with a notice of its privacy and security policies governing access to and disclosure of customer data and aggregated data. This notice shall:
- 1) Define terms used in the notice related to customer data.
 - 2) Indicate method and frequency of customer data transmittal and access available (electronic, paper, etc.), as well as the security protections or requirements for such transmittal;
 - 3) Indicate the period of time and interval (e.g., hourly, daily, monthly) of data collection for which the readily available data can be provided;
 - 4) Inform the customer that the utility will make customer data available to identified third parties with the customer's ongoing consent.
 - 5) Inform customers that the privacy and security of their customer data will be protected by the utility while in its possession;
 - 6) Inform customers of the timeframe for processing requests for customer data;
 - 7) Explain any fees that may be associated with processing a request for customer data;
 - 8) Advise customers that their customer data will not be disclosed to third parties without their explicit consent in a manner and form prescribed by the Commission as outlined in Commission Rule R8-51(c);
 - 9) Describe the utility's policies regarding how a customer can authorize access and disclosure of its data to third parties;
 - 10) Describe how the customer can terminate third-party access to its customer data;
 - 11) Explain that aggregated usage data does not contain customer-identifying information and inform customers that customer data may be used to create aggregated data that will not contain customer-identifying information;
 - 12) Explain that the utility may provide aggregated data to third parties, subject to Commission Rule R8-51; and

- 13) Provide a customer service phone number and web address where customers can direct additional questions or obtain additional information regarding their customer data, the disclosure of customer data or aggregated data, or the utility's privacy policies and procedures with respect to customer data or aggregated data.

Third-Party Access to Customer Data from a Utility.

- g) A utility shall not disclose customer data to a third party unless the customer submits a paper or electronically-signed consent form. The utility shall conspicuously post the form on the utility's website in either electronic or printable format. The utility must authenticate the customer identity and consent to release customer data before acting upon the consent form. Consent to disclose customer data is valid to the extent provided for by the customer with respect to the data released and shall be ongoing until affirmatively rescinded by the customer. The ability and means to terminate ongoing consent will be made available to the customer. Unless termination is expressly provided for in the utility's customer consent form established under subsection (i), termination of electric utility service will not terminate consent to disclose customer data granted by the customer.
- h) A utility may make available an electronic customer consent process for disclosure of customer data to a third party, provided that the utility authenticates the customer's identity and consent to release customer data. The contents of the electronic consent process must generally follow the format of the Commission-prescribed consent form, and include the elements to be provided pursuant to this rule.
- i) The customer consent form shall include:
- 1) Applicable customer information to adequately identify the specific customer,
 - 2) The name of the third -party recipient, including trade name if applicable, physical address, mailing address, email address, and telephone number;
 - 3) An indication of one-time consent, ongoing consent, or term-limited consent;
 - 4) Descriptions of the readily-available data elements being requested; and
 - 5) Notice to the customer that the utility shall not be responsible for monitoring or taking any steps to ensure that the third party to whom the data is disclosed is maintaining the confidentiality of the data or using the data as intended by the customer.
- j) Changes of contact names for an organization, trade name, or utility over time do not invalidate consent as to the respective organization, trade name, or utility. Modifications to the consent form over time do not invalidate previous consent.

- k) The utility shall maintain records of all customer consent forms in a manner consistent with its current document retention policies.

Requests for Aggregated Data Reports from a Utility.

- l) A utility may disclose readily available aggregated customer data that consists of at least fifteen customers, where the data of a single customer or premise associated with a single customer's data does not comprise 15 percent or more of the aggregated data within the same customer class. In aggregating customer data to create an aggregated data report, a utility must ensure the data does not include any unique identifiers. A utility shall not be obligated to provide aggregated customer data in response to multiple overlapping requests from or on behalf of the same requestor that have the potential to identify customer data
- m) If an aggregated data report cannot be generated in compliance with this rule, the utility shall notify the requestor that the aggregated data, as requested, cannot be disclosed and identify the reasons the request was denied. The requestor shall be given an opportunity to revise its aggregated data request in order to address the identified reasons.
- n) The utility shall conspicuously post on its website, or provide in writing upon request by any party, notice of its privacy and security policies governing access to and disclosure of aggregated data. This notice shall:
- 1) Explain the aggregated data reports readily available from the utility, including all available selection parameters (customer data or other data);
 - 2) Indicate the period of time and interval (e.g., hourly, daily, monthly) of data collection for which the readily available data can be provided;
 - 3) Explain the method(s) of transmittal available (electronic, paper, etc.) and the security protections or requirements for such transmittal;
 - 4) Provide the applicable charges for providing an aggregated data report;
 - 5) Indicate the timeframe for processing requests;
 - 6) Provide a form for requesting an aggregated data report from the utility identifying any information necessary from the requestor in order for the utility to process the request; and
 - 7) Provide a customer service phone number and web address where customers can direct additional questions or obtain additional information regarding their

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customer data, the disclosure of customer data or aggregated data, or the utility's privacy policies and procedures with respect to customer data or aggregated data.

- o) Nothing in this Rule shall be construed to impose any liability on a utility or any of its directors, officers and employees, relating to disclosures of customer information when 1) the Commission orders the provision of customer data to a third party; or 2) a customer discloses or authorizes the utility to disclose or provide access to its customer data to a third party. Specifically, after a utility transfers customer data pursuant to this Rule, a utility shall not be responsible for the security of the information or its use or misuse by such customer or by any third party.

Effective January 1, 2022, subsections (d), (g), and (h) of R8-51 as proposed by the Public Staff are amended to read:

- d) A utility shall maintain at least 24 months of customer data in sufficient detail to assist customers in understanding their energy usage. The frequency interval of data must be commensurate with the meter or network technology used to serve the customer. Customer data shall be maintained and made available to customers and customer-authorized third parties in electronic machine-readable format that conforms to the latest version of the North American Energy Standard Board's (NAESB) Req. 21, the Energy Services Provider Interface (ESPI), or a Commission approved electronic machine-readable format that conforms to nationally-recognized standards and best practices ~~commensurate with the meter or network technology used to serve the customer.~~

...

- g) A utility shall not disclose customer data to a third party unless the customer provides consent by either submitting submits a paper or electronically signed consent form or through the utility's electronic consent process. The utility shall conspicuously post the form on the utility's website in either electronic or printable format. The utility must authenticate the customer identity and consent to release customer data before acting upon the consent form. Consent to disclose customer data is valid to the extent provided for by the customer with respect to the data released and shall be ongoing until affirmatively rescinded by the customer. The ability and means to terminate ongoing consent will be made available to the customer. Unless termination is expressly provided for in the utility's customer consent form established under subsection (i), termination of electric utility service will not terminate consent to disclose customer data granted by the customer.
- h) A utility ~~may~~ shall make available an electronic customer consent process for disclosure of customer data to a third party, provided that the utility authenticates the customer's identity and consent to release customer data. The contents of the electronic consent process must generally follow the format of the Commission-prescribed consent form, and include the elements to be provided pursuant to this rule.